In this case, however, although it has been shown that indeed the applicant was not, as appellant, given notice of the hearing date and was consequently absent at the date of hearing of the appeal and the appeal may be reinstated, the Public Prosecutor through the Deputy Public Prosecutor has intervened to object to the reinstatement of the appeal. It is manifestly clear the Public Prosecutor will not be supporting the appeal on the merits of the case if it should be reinstated. Only the Public Prosecutor would have the right of audience in the hearing of the appeal if it should be reinstated. Accordingly, I found it futile to reinstate the appeal and I dismissed the application.

Application dismissed.

Solicitors: *Faiza & Co.*

MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD. v. G & C SECURITIES SDN. BHD. & ANOR.

[A.C.J. (Shankar J.) 28 March 1988]

[Kuala Lumpur – Suit No. C23-1657-86]

Banking – Loan secured by charge and guarantee – Whether creditor bank can commence legal proceedings against borrower/chargor and guarantor before realization of security.

Contract – Guarantee – Loan secured by charge and guarantee – Guarantor sued by creditor before realization of security – Whether possible.

The plaintiff bank gave a loan to the first defendant and by way of security, the first defendant executed a charge in its favour. The second defendant, who was the director of the first defendant, also executed a written guarantee for the repayment on demand of all sums owing by the first defendant. Subsequently, the loan was not repaid in accordance with the wishes of the plaintiff and the plaintiff initiated an action against the first and second defendants for the repayment of the debt. The Senior Assistant Registrar gave summary judgment for the plaintiff and the defendants appealed against this decision.

The defendants contended, *inter alia*, that the effect of article 11.03 of the charge document was that the plaintiff bank was obliged to have the charged properties sold first and only then was it entitled to sue the first or second defendant for the balance.

Held, dismissing the appeal: article 11.03 of the charge document does not impose any such obligation upon the plaintiff bank. It was open to the plaintiff bank to proceed simultaneously against the second defendant as well, as clause 3 of the guarantee provided that all monies due from the first defendant could nevertheless be recoverable from the second defendant as principal debtor and clause 4 provided that the guarantee was in addition to and not a substitution for any other rights which the plaintiff bank may have had under the charge.

Cases referred to:

(1) *Perwira Habib Bank* v. *Gemintan & Ors.* K.L. High Court Civil Suit No. 1107 of 1986 (unreported) (refd).

(2) *Bank Bumiputra Malaysia Bhd.* v. *Esah bte Abdul Ghani* [1986] 1 M.L.J. 16 (refd).

APPEAL FROM REGISTRAR'S DECISION.

Too Hing Yeap for the plaintiff/respondent.

A. Kanesalingam for the defendants/appellants.

Cur. Adv. Vult.

Shankar J.: This is an appeal by the defendants against the decision of the Senior Assistant Registrar giving the plaintiffs summary judgment.

On 14 December 1982, the plaintiffs (the bank) gave a loan to the first defendant (the company) of $665,000. By way of security, the company executed a charge in favour of the bank. The money was required to carry out a project to build three bungalows on three lots of land. All three lots were the subject of the charge. The same day the charge was executed, the second defendant who was the director of the company executed a written guarantee for the repayment on demand of all sums owing by the company. Thereafter, monies were advanced but evidently the loan was not repaid in accordance with the wishes of the bank. On 31 March 1986 they claimed that there was due and owing to them by way of balance of principal and interest thereon the sum of $335,958.52. The bank through their solicitors demanded the repayment of the debt by A.R. registered letters from the first and the second defendants. But the defendants failed to pay and the bank's solicitors initiated this action against the company and the second defendant.

Shortly after appearance was entered, the bank filed the application for summary judgment. In the affidavit in support of the application, the bank exhibited the guarantee and a statement of account certified by the bank manager setting out the balance of principal and interest owing by the defendants. When the matter first came up before the Senior Assistant Registrar on 12 December 1986, counsel for the defendant took the point that the application was irregular because the bank had not exhibited the basis of their claim against the company. So plaintiffs' counsel requested an adjournment to file this evidence. The adjournment

was granted. On 22 December 1986, a supplementary affidavit was filed by the bank manager attaching the charge executed by the company. The covenants in the charge spelt out the indebtedness of the first defendant and the manner of its proposed resolution. On 5 January 1987, the second defendant on behalf of himself and the company filed an affidavit in reply. Objection was taken to the application for summary judgment on two grounds – firstly that the rate of interest of 5% above cost of funds instead of 3% above cost was a penal rate of interest and therefore harsh and unconscionable and secondly that since the bank had already instituted foreclosure proceedings under the charge it should not be permitted to maintain the present action. At the hearing before the Senior Assistant Registrar on 7 January 1987, the only argument advanced on behalf of the defendant was that the charge should be realized first before the suit was proceeded with.

With this submission, the Senior Assistant Registrar did not agree and gave judgment for the plaintiffs with costs. So the defendants appealed to me.

I will now deal with the submissions made by defence counsel and the court's responses thereto. First, it was submitted that the effect of article 11.03 of the charge was that the bank was obliged first to have the properties sold and only then was it entitled to sue the company or the guarantor for the balance. The defendants contended that since the bank could obtain a foreclosure order in a separate application they were not entitled to file this suit.

With respect to counsel for the defence I am unable to agree that article 11.03 of the charge imposes any such obligation upon the bank. All that it says in simple language is that if the proceeds of the sale of the land were insufficient to settle the debt the company would continue to be liable to pay the balance still due. Article 10 of the charge imposed a liability on the company to pay the balance of the loan on demand together with the interest thereon. It is the opinion of this court that this contractual obligation could be enforced by direct action against the company. So far as the second defendant was concerned, clause 3 of the guarantee provided that all monies due from the company could nevertheless be recoverable from him as principal debtor, and clause 4 provided that the guarantee was in addition to, and not in substitution for, any other rights which the bank may have had under the charge. Clearly therefore, it was open to the bank to proceed simultaneously against the second defendant as well.

Defence counsel submitted a number of English authorities to the effect that contracts of guarantee should be construed strictly in favour of the guarantor and that no liability should be imposed on him which is not clearly and distinctly covered by the contract (see *Chitty on Contracts*, 25th Ed. Vol. 2 paragraph 4425 and the cases therein cited). Upon any construction of the loan document, I am unable to say that the bank was not strictly within its rights in acting as they did. Consequently, this objection is without substance.

The next point that was taken was that the sum claimed already included interest and since no explanation was given as to how this figure was reached the bank was not entitled to judgment. However, article 3.06(d) of the charge specifically stated that the bank's certificate as to the interest rate applicable for any interest period shall, in the absence of any manifest error, be conclusive and binding on the company. Clause 12 of the guarantee agreement provided likewise. The defendants made no effort whatsoever to show that there was any manifest error or at all in the bank's certificate and consequently I hold that this submission is also without substance.

What appears to have incensed the defendants is that the bank should be endeavouring to make recovery against them personally whilst the security was still unsold. I made some observations about this in my judgment in *Perwira Habib Bank* v. *Gemintan & Ors.*[1] The position in law in Malaysia has already been concluded by the Supreme Court in *Bank Bumiputra* v. *Esah bt. Abdul Ghani.*[2]

The formula used by the plaintiffs for computing interest is nothing more than what they are entitled to do under the loan documents. Accordingly, this appeal must be dismissed with costs to be taxed and paid by the defendants to the plaintiffs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Kanesalingam & Co.*